

Montana Water Court  
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**FILED**  
01/05/2023  
Sara Calkins  
CLERK  
Montana Water Court  
STATE OF MONTANA  
By: D'Ann CIGLER  
41G-0497-R-2022  
Weisz, Madeleine  
11.00

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
JEFFERSON RIVER BASIN (41G)  
PRELIMINARY DECREE

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CLAIMANTS: Harry E. Clark; Harry E. Sconfienza

OBJECTOR: United States of America (USDA Forest  
Service)

**CASE 41G-0497-R-2022**  
41G 95749-00  
41G 143055-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

**FINDINGS OF FACT**

1. Claims 41G 95749-00 and 41G 143055-00 appeared in the 41G Preliminary Decree with DNRC issue remarks. The claims also received objections from the United States Forest Service (USFS).

2. The Preliminary Decree abstracts for both claims 41G 95749-00 and 41G 143055-00 listed the ownership information as:

HARRY E CLARK  
167 N HWY 77  
DECLO, ID 83323 5035  
HARRY E SCONFENZA  
167 N HIGHWAY 77  
DECLO, ID 83323 5035

The ownership information appears to be incorrect, most likely due to a clerical error, given that the same address is listed for both Harry E. Clark and Harry E. Sconfienza and there is no record of a “Harry E.” Sconfienza owning a portion of the place of use.

3. During proceedings in this case, Harry E. Clark notified the court that Neil Sconfienza may own a portion of the place of use claimed by 41G 95749-00 and 41G 143055-00. Neil Sconfienza was added to the service list, provided notice of his potential ownership in the claim, and instructed how to update ownership if appropriate. No ownership updates have been submitted to the DNRC, and Sconfienza has not appeared in this case.

4. On September 30, 2022, Harry E. Clark and the USFS filed a Stipulation to Resolve Objections. The Stipulation is not signed by Harry E. Sconfienza. Though it appears likely that Harry E. Sconfienza is listed as an owner in error, a final opportunity was provided for Harry E. Sconfienza, or potential owner Neil Sconfienza, to participate in these proceedings. A show cause order was issued for Sconfienza to indicate whether he agreed to the terms of the stipulation. The order stated that if nothing was filed by the deadline, the court would conclude that Sconfienza agreed with the terms of the Stipulation. Nothing was filed by the deadline.

5. In the Stipulation, Clark and the USFS agree that claim 41G 95749-00 has been abandoned and should be dismissed from the adjudication. One of the DNRC issue remarks appearing on claim 41G 95749-00 supports the assertion that claim 41G 95749-00 has been abandoned. The issue remark states:

THE POINT OF DIVERSION, RESERVOIR RECORD, AND PLACE OF USE ARE IN QUESTION. THERE DOES NOT APPEAR TO BE A RESERVOIR AT THE CLAIMED LOCATION.

Claim 41G 95749-00 should be dismissed from the adjudication.

6. In the September 30, 2022 Stipulation, Clark and the USFS propose several changes to claim 41G 143055-00 to resolve the USFS objection.

- the place of use should be reduced from 58.00 acres to 34.00 acres
- the irrigation type should be changed from flood irrigation to natural subirrigation
- the flow rate should be replaced with an information remark stating “no flow rate has been decreed for this use of natural subirrigation”
- the source type should be changed from surface water to groundwater
- the source name should be changed from “Pappas Creek” to “Subirrigation, Unnamed Tributary of Pappas Creek”
- the point of diversion should be changed to match the place of use
- The diversion means should be changed from “headgate” to “subirrigation”
- the period of use and the period of diversion should be changed from April 1 – October 31 to January 1 – December 31

Attached to the Stipulation is a map showing the proposed place of use, which is made up of 34.00 acres outlined in red. The map supports the assertion that subirrigation is occurring within the proposed place of use. The parties indicate that the place of use is owned entirely by Harry E. Clark.

7. The terms of the Stipulation are either reductions of the claimed elements or are supported by the evidence before the court. The Stipulation should be accepted by the court.

8. Claim 41G 143055-00 received a DNRC issue remark stating that the ditch name was modified as a result of DNRC review during reexam. The issue remark is considered a notice issue remark and does not overcome the prima facie status of the case. The stipulation requests changes to claim 41G 143055-00 that result in the removal of the ditch name added by the DNRC. The issue remark has provided the necessary notice and should be removed from the claim.

### CONCLUSIONS OF LAW

1. A properly filed claim of an existing right or an amended claim of existing right is prima facie proof of its content. § 85-2-227, MCA. This prima facie proof may be

contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. The information included in the stipulation overcomes the prima facie status of the claims, indicating claim 41G 95749-00 should be dismissed, and claim 41G 143055-00 should be modified pursuant to the parties' stipulation.

2. Existing water rights are subject to the law of abandonment. A long period of non-use raises a rebuttable presumption of abandonment. "Once an appropriator abandons a water right, the right ceases." *Holmstrom Land Co. v. Meagher Cnty. Newlan Creek Water Dist.*, 185 Mont. 409, 423, 605 P.2d 1060, 1068 (1979). The claimant Harry Clark agrees that claim 41G 95749-00 has been abandoned. Sconfienza has not offered any information or evidence to rebut the presumption of abandonment. Claim 41G 95749-00 should be dismissed from the adjudication as abandoned.

3. Section 85-2-248(2), MCA requires the Water Court to resolve all issue remarks that are not resolved through the objection process. The issue remark appearing on claim 41G 143055-00 does not overcome the prima facie status of the claim and should be removed from the abstract.

4. If a claimant fails to comply with an Order issued by the Water Court in its review of issue remarks, including an Order issued by a Water Master appointed by the Court, the Court on its own initiative may amend or dismiss the claim to conform with information in the claim file or information obtained as part of the adjudication process. Section 85-2-248(9) MCA. Sconfienza has not responded to multiple orders of the court. Accordingly, based on the best information before the court, claim 41G 95749-00 should be dismissed from the adjudication, and claim 41G 143055-00 should be modified pursuant to the terms of the stipulation.

#### RECOMMENDATIONS

1. Claim 41G 95749-00 should be dismissed from the adjudication.
2. Claim 41G 143055-00 should be modified as discussed above.

Post Decree Abstracts of Water Right Claims are served with the Report to confirm that claim 41G 95749-00 has been dismissed and the recommended modifications have been made to claim 41G 143055-00.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

**Service via USPS Mail:**

Harry E. Sconfienza  
167 N. HWY 77  
Declo, ID 83323-5035

*Potential Owner:*

Neil Sconfienza  
528 S Alabama Street  
Butte, MT 59701-2322

**Service via Electronic Mail:**

Eve W McDonald, Trial Atty  
US DOJ-ENRD  
999 18<sup>th</sup> St, So Terrace, Ste 370  
Denver, CO 80202  
(303) 844-1381(Eve)  
Evelyn.mcDonald@usdoj.gov  
MontanaBasins.ENRD@USDOJ.GOV

W John Tietz  
Browning, Kaleczyc, Berry & Hoven PC  
PO Box 1697  
Helena, MT 59624  
(406) 443-6820  
john@bkbh.com  
bethany@bkbh.com  
kathys@bkbh.com

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
JEFFERSON RIVER  
BASIN 41G**

**Water Right Number:**      **41G 95749-00**    STATEMENT OF CLAIM

**Version:**      3 -- POST DECREE

**Status:**      **DISMISSED**

**Owners:**                      HARRY E CLARK  
                                      167 N HWY 77  
                                      DECLO, ID 83323 5035  
  
                                      HARRY E SCONFIENZA  
                                      167 N HIGHWAY 77  
                                      DECLO, ID 83323 5035

**Priority Date:**

**Type of Historical Right:**

**Purpose (use):**                      IRRIGATION

**Flow Rate:**

**Volume:**

**Source Name:**                      PAPPAS CREEK

**Source Type:**                      SURFACE WATER

**Point of Diversion and Means of Diversion:**

**Period of Use:**

**Place of Use:**

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**Remarks:**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
JEFFERSON RIVER  
BASIN 41G**

**Water Right Number:** 41G 143055-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**\*Owners:** HARRY E CLARK  
167 N HWY 77  
DECLO, ID 83323 5035

**Priority Date:** APRIL 24, 1919

**Type of Historical Right:** USE

**Purpose (use):** IRRIGATION

**Irrigation Type:** NATURAL SUBIRRIGATION

**Flow Rate:** NO FLOW RATE HAS BEEN DECREED FOR THIS USE OF NATURAL SUBIRRIGATION.

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 5 - LOW

**\*Maximum Acres:** 34.00

**Source Name:** SUBIRRIGATION, UNNAMED TRIBUTARY OF PAPPAS CREEK

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		S2N2	33	3N	6W	JEFFERSON

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** SUBIRRIGATION

**Period of Use:** JANUARY 1 TO DECEMBER 31

**\*Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	34.00		S2N2	33	3N	6W	JEFFERSON
<b>Total:</b>	34.00						

41G 143055-00 Place of Use

